No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

No. 98-1904

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A divided panel of the Ninth Circuit ordered the release of a classified diplomatic communication based solely on the majority's conclusion that the letter "appear[s]" to be "innocuous." Pet. App. 13a, 17a. In so holding, the court of appeals refused to accord any deference to the declarations of the responsible Executive Branch officials, which explained how disclosure of the document *would* damage the United States' foreign relations, both with a critical ally and more broadly. In particular, the declarations explained in detail how the very act of disclosure of a letter that was sent in confidence by the British government and that pertains to a diplomatically sensitive extradition case[1] would imperil on-

[1] See, *e.g.*, Owen Bowcott, *Extra-special Relationship*, The Guardian, July 5, 1994, at T18 (describing the 124-year history of British/ U.S. cooperation in extradition matters; attorney claims the Home Secretary is "fearful of upsetting the Americans maybe because he wants IRA suspects held in the States sent back here"; "[e]xtradition appeals have the quality of transforming themselves into political issues"); Christopher Reed, *IRA "Quid Pro Quo" Deal Suspected*, The Guardian, Apr. 5, 1994, at 4 ("It will not have escaped the Home Secretary's notice in considering the extradition to America of Sally Croft and Susan Hagan * * * that four

going and future exchanges with the British government on many matters, including in the vitally important area of law enforcement cooperation. See *id.* at 52a-54a, 56a-58a. The Ninth Circuit's disregard of the Executive's judgment concerning the harm to foreign relations that disclosure will entail conflicts with decisions of this Court and of other courts of appeals and ignores the Executive Order's plain language. Rather than answer those arguments, respondent relies on changes in the governing Executive Order that are not involved in this case; attempts to distinguish the decisions of other courts of appeals and of this Court on grounds that have no bearing on their conflict with the decision below; and strains to rationalize the Ninth Circuit's substitution of its own foreign policy judgment for that of the Executive Branch.

1. The court of appeals' holding that the Executive Branch must "justify" judicial deference to its foreign relations judgments through an unspecified "initial showing," see Pet. App. 16a, conflicts with the decisions of numerous other courts of appeals, all of which accord the views of Executive officials "substantial weight" at the outset, and with decisions of this Court affording the "utmost deference" to the Executive's judgments about the need for secrecy in foreign relations. See Pet. 13-18. Respondent's efforts to avoid those conflicts fail.

a. Respondent observes (Br. in Opp. 19-24) that none of the cases cited as conflicting with the Ninth Circuit's denial of deference arose under the current Executive Order (No. 12,958; see Pet. App. 65a-111a). That is true, but irrelevant for a number of reasons. First, at least one court of appeals and numerous district courts have also hewed to the "substantial weight" standard of deference in cases arising under the current Executive Order, without requiring any "initial showing" to "justify" deference.[2]

IRA prison escapers in California are the subject of intense—and so far unsuccessful—attempts to extradite them to Britain.").

[2] See, *e.g.*, *Frugone* v. *CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) ("Mindful that courts have little expertise in * * * international diplo-

Second, the present case was decided on the basis that the classified letter concerns the "foreign relations or foreign activities of the United States." See Pet. App. 7a. Nothing in the new Executive Order altered the manner in which such information is classified, see § 1.5(d); Exec. Order No. 12,356, § 1.3(a)(5) (3 C.F.R. 169 (1983)), and respondent does not contend otherwise. While respondent discusses at length (see Br. in Opp. 16-17, 19-21, 24-25) the current Executive Order's elimination of a presumption in the prior Order that the release of "foreign government information" would damage the United States' foreign relations (see Exec. Order No. 12,356, § 1.3(b) and (c)), the court of appeals did not address the letter's status as "foreign government information." A change in a classification category that did not form the basis of the court's decision thus cannot explain the departure from other courts' rulings.

Third, even were the change in the Executive Order's treatment of "foreign government information" relevant, the elimination of an across-the-board presumption that disclosure will *always* hurt the national security plainly does not mean that disclosure will *never* do so; it simply means that the responsible Executive official must determine in each case whether an expectation of confidentiality existed and whether breaching it would harm our diplomatic relations. The declarations here did precisely that. See Pet. 5-7; see also Pet. 11. Indeed, the elimination of the presumption magnifies, rather than diminishes, the Ninth Circuit's departure from precedent. The court of appeals did not simply disregard a generalized presumption; it refused to defer to the expert and individualized judgments of Executive Branch officials focused on the precise disclosure issue before the court.

---

macy * * *, we are in no position to dismiss the CIA's facially reasonable concerns"; "government affidavits regarding harm * * * [are] entitled to 'substantial weight.' "); *Students Against Genocide* v. *Department of State*, No. Civ. A96-667, 1998 WL 699074, at *5 (D.D.C. Aug. 24, 1998); *Billington* v. *Department of Justice*, 11 F. Supp. 2d 45, 54 (D.D.C. 1998).

Fourth, and most fundamentally, nothing in the current Executive Order changed the relationship between the courts and Executive officials in this context or invited courts to evaluate de novo the foreign relations implications of document disclosures. Where the Ninth Circuit went astray was in disregarding the constitutionally mandated rule that courts give "substantial weight" to the Executive Branch's foreign policy judgments and "unique insights" about the harm disclosure would cause (see Pet. 18 & n.7). That rule is an enduring one, spanning multiple decades and numerous Executive Orders. See *id.* at 15-17. For that reason, the fact that the decisions of other courts of appeals arose under the prior Order or involved different forms of national security information is of no moment. For example, although *Jones* v. *FBI*, 41 F.3d 238 (6th Cir. 1994), arose under an Executive Order that presumed harm from the particular type of disclosure, the Sixth Circuit held that "a reviewing court should accord 'substantial weight' to the agency's affidavits regarding classified information," *id.* at 244, without ever mentioning that presumption. The assignment of "substantial weight" to Executive Branch judgments and affidavits in *McDonnell* v. *United States*, 4 F.3d 1227, 1243 (3d Cir. 1993); *Miller* v. *United States Dep't of State*, 779 F.2d 1378, 1387 (8th Cir. 1985); and *Doherty* v. *United States Dep't of Justice*, 775 F.2d 49, 52 (2d Cir. 1985), were likewise made without any reference to the presumption of harm.[3]

b. Respondent's insistence (Br. in Opp. 19-21) that the Ninth Circuit's denial of deference can be reconciled with other courts' rulings by viewing the decision below as a

---

[3] Similarly, in *Krikorian* v. *Department of State*, 984 F.2d 461 (1993), the District of Columbia Circuit accorded "*substantial weight* to an agency's affidavit" about the impact of disclosure on "reciprocal confidentiality" *before* it referenced the presumption of harm, and cited in support of its deference only cases that predated the Reagan Executive Order's creation of such a presumption. *Id.* at 464-465; accord *Bowers* v. *United States Dep't of Justice*, 930 F.2d 350, 357-358 (4th Cir.), cert. denied, 502 U.S. 911 (1991).

straightforward application of *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), is simply wrong. As an initial matter, it is "passing strange" (Br. in Opp. 22 n.11) that, if this were a *Vaughn* case, the court of appeals never cited *Vaughn* in its opinion, and respondent never cited *Vaughn* in his appellate briefs.

The obvious reason *Vaughn* is inapplicable is that respondent conceded and the court agreed that the letter was properly categorized as information concerning the "foreign relations or foreign activities of the United States," see Pet. App. 7a, and the State Department declarations plainly "identif[ied] or describe[d] the damage" to national security that would result from disclosure. See Exec. Order No. 12,958, § 1.2(a). Mr. Kennedy, in particular, attested that (1) the British government had an expectation of confidentiality in the precise document at issue,[4] (2) the United States recognized that expectation as reasonable, and (3) disclosure of the letter over the British government's repeated objections would imperil the United States' international law enforcement interests, ongoing cooperation in extradition matters with Britain, and "our ability to conduct the foreign relations of the U.S." Pet. App. 56a-58a.

Thus, the only issue before the court of appeals was the *legal* question whether the harm that the declarations described—harm arising from the very act of breaching a foreign government's legitimate expectation of confidentiality—constituted a form of harm to the national security cognizable under the Executive Order. The Ninth

---

[4] Respondent's suggestion (Br. in Opp. 10) that the British government was willing to release the document to the defense ignores that government's repeated statements to the contrary. See Pet. 10 n.4; Resp. App. 30a ("In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality."). In any event, the possibility in other circumstances that a document might be made available (perhaps under a protective order) to a party making a particularized showing of need for it in a judicial proceeding scarcely suggests that it is thereby rendered freely available to the public at large under FOIA, 5 U.S.C. 552(a).

Circuit pointedly refused to consider that harm to the national security. See Pet. App. 13a (faulting the government for "focus[ing] on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations * * * even if the content 'appear[s] to be innocuous' "). As a result, the court denied any deference to the Executive Branch's explanation of the damage to foreign relations that would ensue from disclosure because it was not "justif[ied]" under the court's (rather than the Executive Order's or the Executive Branch's) vision of the relevant harm to national security. That is not a *Vaughn* problem; it is a substitution-of-judgment problem. The Executive Branch, unlike respondent and the Ninth Circuit, has concluded that it is important for this Nation to honor its commitment to protect the confidential relationship. "Great nations, like great men, should keep their word." *Heckler* v. *Matthews*, 465 U.S. 728, 748 (1984).

2. a. The court of appeals' and respondent's refusal to recognize that the Executive Order protects against harm to foreign relations arising from the very act of disclosure is fundamentally wrong and contrary to the rulings of this Court and other circuits. See Pet. 21-27. Respondent, attempts to elide the conflict by arguing that the "structure" of the current Executive Order excludes harm arising from the act of disclosure. Br. in Opp. 24. It is implausible in the extreme to suppose that the President would order such a wholesale abrogation of the longstanding practice of diplomatic confidentiality, and in fact the text of the Executive Order says exactly the opposite. The change in Orders therefore provides no basis for distinguishing the decisions of other circuits or of this Court.[5]

---

[5] Under the current Executive Order, other courts have specifically deferred to Executive claims of harm arising from the breach of a promise of confidentiality to a foreign government. *Students Against Genocide*, 1998 WL 699074, at *11; *Billington*, 11 F. Supp. 2d at 58 ("disclosure could reasonably be expected to cause serious damage to the national security as it would violate the FBI's promise of confidentiality").

Both the prior and the current Executive Orders make "damage to the national security" the touchstone for classification. See Exec. Order No. 12,958, § 1.2(4); Exec. Order No. 12,356, § 1.1. The current Executive Order, unlike its predecessor, provides a definition of "damage to the national security" the terms of which plainly embrace harm arising from the "disclosure of information." Exec. Order No. 12,958, § 1.1(*l*). Furthermore, the Executive Order separately provides that, if "the release" of classified information will "damage relations between the United States and a foreign government," the document falls within the extraordinary category of information that is exempt from the general requirement of declassification after ten years. See § 1.6(d)(6). That special exception confirms that the damage to foreign relations resulting from release of a document is an independent component of the "[d]amage to the national security" covered by the Executive Order.[6] Respondent's contrary approach, moreover, would lead to the bizarre conclusion that a foreign government's threat to terminate negotiations with the United States on a sensitive matter, or to refuse to afford reciprocal protection for the confidences of the United States if its own confidences are not preserved, would not "harm * * * [the] foreign relations of the United

---

[6] Respondent is simply wrong in asserting (Br. in Opp. 5, 28 n.6) that the current Executive Order eliminated the mosaic approach to classification, see Exec. Order No. 12,958, § 1.8(e); *Billington*, 11 F. Supp. 2d at 54, and thus implicitly precludes discerning harm from beyond the four corners of the particular document. Furthermore, the court of appeals ignored this Court's direction in *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965), that courts defer to the Executive's reasonable interpretation of an Executive Order. Respondent's extraordinary claim that the Executive "is not entitled to any deference" under *Udall* (Br. in Opp. 25 n.13) is meritless. The Executive's position in this case was first manifested when the FOIA request was denied, not when the litigation commenced, and that position was then elaborated upon in declarations filed with the court, as FOIA and *Vaughn* specifically contemplate. Accordingly, the Executive's interpretation of the Executive Order merits great deference. Cf. *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 741 (1996).

States" (*id.* § 1.1(*l*)).[7] In international law enforcement, in particular, preserving the trust and ongoing cooperation of foreign governments is a distinct foreign policy objective, separate and apart from any individual criminal matter.

b. Respondent (Br. in Opp. 24-28), like the court of appeals (Pet. App. 14a-15a), contends that reliance on harm arising from the act of disclosure itself is proper only if either *all* information exchanged between governments or *all* extradition information is exempt from disclosure. Nothing in the text of the Executive Order or of FOIA supports such a rule of categorical treatment. See Pet. 27-28. Rather, when Executive officials demonstrate in an individual case (as they have here) that the disclosure of a particular document would harm the United States' relations with a foreign government, that harm is sufficient for classification under the Executive Order, and thus for withholding under FOIA.

Accordingly, respondent's claim (Br. in Opp. 26-27) that "extradition documents" are unsuited for "categorical" exemption misunderstands our position. To the extent he argues that some documents relating to an extradition are subject to disclosure in criminal prosecutions, we agree. But to the extent respondent suggests that the extradition context diminishes the traditional confidentiality of diplomatic communications, he is fundamentally mistaken. Criminal defendants do not "routinely have access to" (*id.* at 26) foreign government communications in extradition cases. While defendants generally do obtain a foreign government's public extradition documents (such as the extradition decision, warrants, and hearing transcripts), that is a far cry from the notion that they have routine access to the underlying inter-governmental communications. Quite the opposite is true. The United States does not release to the public most foreign government communications in extradi-

---

[7] Compare *CIA* v. *Sims*, 471 U.S. 159, 175 (1985) (if confidential sources "come to think that the [United States] will be unable to maintain the confidentiality of its relationship to them, many could well refuse to supply information to the [United States] in the first place"); *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 n.23 (1984).

tion cases. Such communications may contain sensitive law-enforcement information regarding, for example, crimes committed, the location of fugitives, criminal investigative sources and methods, investigative or prosecutorial strategies, and security concerns. Candid exchanges of that and other vital information would not occur if foreign governments and their law enforcement officials feared public disclosure of their statements.[8]

The doctrine of specialty to which respondent refers (Br. in Opp. 26-27) is no exception. When an issue arises in a criminal prosecution concerning the foreign government's consent to the charging of a particular offense, the court routinely considers publicly available documents or asks the government to consult with the foreign government and then report back on whether prosecution of a particular count may proceed.[9] We are aware of no case in which, as part of that process, the underlying confidential exchanges between the United States and a foreign government were filed with the court or publicly disclosed.[10]

---

[8] *In re Romeo*, No. 87-0808RC, 1987 WL 10373 (D. Mass. May 1, 1987) (cited at Br. in Opp. 27), offers respondent no help. While the court held that an extradition hearing should be open to the public, it "[could] find no cases or history which indicate a tradition of accessibility to extradition documents." *Id.* at *3.

[9] See, *e.g.*, *SEC* v. *Eurobond Exchange, Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994); *United States* v. *Khan*, 993 F.2d 1368, 1373-1374 (9th Cir. 1993). We have been informed that, in the case of respondent's client, a distinct surrender warrant from the British government identified the charges on which the defendants could be prosecuted. Respondent offers no support for his assertion (Br. in Opp. 30) that the confidential letter at issue here was partly revealed to the district court to address the firearms charge, and we have been informed that no such disclosure was made.

[10] Respondent is mistaken in asserting (Br. in Opp. 30) that the State Department's letter of inquiry to the British Embassy regarding respondent's FOIA request (see Resp. App. 29a) establishes that the United States did not consider the extradition letter respondent seeks to be confidential. Given the ambiguous wording of that initial letter of inquiry, the British government's firm response, the State Department's declarations that it understood the communication to be made in confidence, the

3. Respondent contends (Br. in Opp. 17) that certiorari is not warranted because the President can rewrite his Executive Order. But, as explained above, the problem with the Ninth Circuit's ruling is not the Executive's failure to follow the terms of its own Order. The State Department's declarations did precisely what the Executive Order requires: they described the harm to the United States' foreign relations that would result from disclosure. The problem, rather, is the Ninth Circuit's dramatic departure from long-established principles of deference to Executive officials' identification and prediction of harm to the national security—principles that FOIA was intended to respect. The President should be able to structure classification procedures for the Executive Branch in a manner that he determines best promotes the public interest and national welfare. He should not have to tailor his Order to protect against or to respond to every judicial misapplication of its terms or departure from settled principles.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

SETH P. WAXMAN
Solicitor General

AUGUST 1999

---

inquiry letter's authorship by an individual lacking classification authority (see Exec. Order No. 12,958, § 1.4), and the lack of evidence that the inquiry letter was anything other than a routine form letter (see U.S. Dep't of State, Office of Freedom of Information, Privacy and Classification Review, *FPC/CDR Procedures Manual* 106 & Form FG-1 (1995)), that initial letter of inquiry does not undermine the subsequent, considered classification judgment. Likewise, respondent errs in contending (Br. in Opp. 30) that the Executive's delay in formally classifying the letter diminishes the significance of the Ninth Circuit's errors. The Executive Order expressly provides for the classification of material after a FOIA request is received. § 1.8(d). Furthermore, respondent does not allege, nor could he, that, prior to the FOIA request, the letter was publicly available or was treated as a non-privileged document; the letter, after all, pertained to an ongoing criminal investigation.